91-178

No. _____

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIRLINES, INC.,
An Illinois Corporation

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state tort claims for pre-employment fraud and deceit which are "independent" of the terms of the Collective Bargaining Agreement and which do not require that the court "interpret" the terms of the Collective Bargaining Agreement are preempted under the Railway Labor Act, 45 U.S.C. § 151 et seq.

2. Whether state tort claims for pre-employment fraud and deceit which do not stem from representations regarding specific terms of the Collective Bargaining Agreement are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

3. Whether state tort claims for pre-employment fraud and deceit which stem from representations regarding terms of the Collective Bargaining Agreement are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

4. Whether state tort claims for fraud and deceit which arise from conduct occurring prior to the employment relationship are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

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Petitioner Nichkol Melanson respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit entered on April 24, 1991.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 931 F.2d 558. This decision appears in the Appendix, *infra*. (App. 1.) The Order of the United States District Court for the Northern

District of California granting United Airlines' Motion to Dismiss is not published. It appears in the Appendix, *infra*. (App. 14)

JURISDICTION

Invoking federal question jurisdiction pursuant to 28 U.S.C. § 1331 United Airlines filed a petition for removal of this action to the United States District Court for the Northern District of California on November 14, 1988. Invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332 United Airlines filed a supplemental petition for removal on December 19, 1988. On March 24, 1989 the United States District Court for the Northern District of California granted United Airlines' motion for dismissal and ordered entry of judgment as requested in said motion on April 12, 1989. Judgment was entered on April 14, 1989.

The decision of the United States Court of Appeals for the Ninth Circuit was issued on April 24, 1991. No petition for rehearing was sought. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 subdivision (1).

STATUTES INVOLVED

The texts of the following statutes appear in the Appendix.

1. California Civil Code § 1709 (App. 30)
2. California Civil Code § 1710 (App. 30)

3. § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (App. 28)

4. Title I, § 1 of the Railway Labor Act, 45 U.S.C. § 151 (App. 16)

5. Title I, § 2 of the Railway Labor Act, 45 U.S.C. § 151a (App. 18)

6. Title I, § 5 of the Railway Labor Act, 45 U.S.C. § 155 (App. 19)

9. Title II, § 201 of the Railway Labor Act, 45 U.S.C. § 181 (App. 24)

10. Title II, § 202 of the Railway Labor Act, 45 U.S.C. § 182 (App. 24)

11. Title II, § 204 of the Railway Labor Act, 45 U.S.C. § 184 (App. 25)

12. Title II, § 205 of the Railway Labor Act, 45 U.S.C. § 185 (App. 26)

STATEMENT OF THE CASE

I. THE FACTS

In late 1985 United Airlines (United) acquired Pan American Airlines' (Pan Am) Pacific routes. As a condition of the acquisition 1202 Pan Am flight attendants had to voluntarily transfer to United by February 11, 1986. Appellant Melanson had been a flight attendant for nearly twenty-two years and was one of those whom United recruited. In this action Melanson alleges that she was induced to transfer by United's representations that the height and weight standards for United flight attendants would be "waived" for Pan Am transferees. Melanson, who had gained weight from hormone treatments for infertility, also alleges that she was told that United

authorized medical exceptions for flight attendants who were on medication.

What United failed to disclose was that it was "waiving" the weight standards for *hiring* purposes only, but would require strict compliance for purposes of *continued employment*. United also failed to disclose that medical exceptions were only authorized for flight attendants taking medication for life threatening diseases.

Prior to her transfer Melanson had informed United that she was gaining weight from the hormone treatments and she informed United that she would not transfer if she were subject to weight requirements that would jeopardize those treatments. Melanson was told, through United agents, that United did not care about her weight and she was hired in spite of the fact that she was overweight by United's standards.

In recruiting Pan Am transferees United communicated directly with the flight attendants. Neither the union which represented Pan Am employees nor the union which represented United employees, took part in the recruitment process.

Within six months of becoming a United employee Melanson was suspended without pay and was forced to stop the hormone treatments in order to lose enough weight to avoid termination.

Melanson and several other Pan Am transferees grieved their suspensions under the "minor dispute" provisions of the RLA, as " . . . unreasonable and arbitrary

application of its [United's] weight program." The arbitrator found that the weight program, which is incorporated into the CBA, was being properly applied. However, due to United's representations during the recruitment process, the arbitrator allowed certain exceptions for the grievants.

On or about September 2, 1988 Melanson filed suit in California Superior Court for the City and County of San Francisco alleging negligent or intentional misrepresentation, concealment and promise without intent to perform. All three theories of fraud and deceit are codified under Cal. Civ. Code §§ 1709 and 1710 (App. 30).

II. PROCEEDINGS BELOW

On November 14, 1988 United removed Melanson's action to the United States District Court for the Northern District of California asserting federal question jurisdiction. On November 19, 1988 United filed a supplemental petition for removal asserting diversity jurisdiction. Melanson did not seek remand.

On March 24, 1989 the United States District Court for the Northern District of California granted United's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b), on the ground that Melanson's claims were preempted by the Railway Labor Act 45 U.S.C. § 151 et seq. Judgment was entered on April 14, 1989. Melanson appealed the judgment to the United States Court of Appeals for the Ninth Circuit. On April 24, 1991, after oral argument, the court of appeals affirmed the district court's dismissal.

The court of appeals held that all three of Melanson's state law claims would "intrude" upon the collective bargaining system established under the Railway Labor Act. *Melanson v. United Airlines*, 931 F.2d 558, 563 (9th Cir. 1991). (App. 11).

The court of appeals did not find that the theory of "promise without intent to perform" required interpretation of the Collective Bargaining Agreement (CBA). However, it did find that this claim could not be litigated without "reference" to the CBA because, " . . . as a practical matter, proof of United's intent not to perform and its nonperformance lead inevitably to the CBA." *Melanson, Id.* at p.563. (App. 10).

The court of appeals found that in order to prevail on her "misrepresentation" theory, Melanson would have to show that the relevant provisions of the CBA differ significantly from United's representations regarding the weight program. This would require what the court characterized as "reference to and interpretation of the terms of the CBA," making the alleged tortious activity " . . . at least 'arguably governed' by the CBA." *Melanson, Id.* at 562-563. (App. 9).

In order to prevail on her "concealment" theory, the court of appeals found that Melanson would have to compare United's representations to the relevant portions of the weight program. This would also require "reference to and interpretation of the CBA." *Melanson, Id.* at 563. (App. 9-10).

The Ninth Circuit declined to apply, by analogy, cases discussing preemption under § 301 of the Labor-Management Relations Act (LMRA), 42 U.S.C. § 185, on

the ground that the narrower test for § 301 preemption, under *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), is not necessarily determinative of preemption under the RLA. Therefore, rather than consider whether Melanson's tort claims were "independent" of the CBA, the court reviewed Melanson's claims to determine whether they were "minor disputes" under the RLA. The court of appeals defined "minor disputes" as disputes which "concern the interpretation or application of" the CBA, *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989), and are "inextricably intertwined with the grievance machinery of" the CBA or the RLA, quoting *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367.

The court did find that Melanson's tort claims were not the subject of a prior arbitration procedure, brought under the "minor disputes" provisions of the RLA. The grievances brought by Melanson and other Pan Am transferees alleged unreasonable and arbitrary application of the weight program, while in this action Melanson alleges that United fraudulently induced her to transfer by misrepresenting that the weight requirements would be waived in her case. *Melanson*, 931 F.2d at 562 (App. 5-6).

The court rejected Melanson's argument that her tort claims were not preempted because she was not an employee when the representations in question were made. The court of appeals declined to hold that claims arising from conduct occurring prior to the commencement of a formal employment relationship are automatically screened from the preemptive force of the RLA, relying on *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944) for the proposition that the CBA supersedes inconsistent individual employment contracts. The court

extended this reasoning beyond contract claims on the ground that nearly any contract claim can be restated as a tort claim. *Id.* 561 (App. 4).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS OF RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS CONFLICTS WITH THE PRINCIPLES OF LABOR LAW PREEMPTION ARTICULATED BY THIS COURT.

Certiorari should be granted in this case because it addresses several important issues regarding preemption of state tort claims by the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq.

Appellant Melanson states fraud and deceit claims based on pre-employment representations made by United Airlines. The primary issue is whether the same principles for determining preemption of state tort remedies should be applied to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and to the RLA.

The facts of this case raise that issue from the perspective of claims which are not based on representations regarding specific terms of the CBA; claims which are based on representations regarding specific terms of the CBA and claims which did not arise from conduct which occurred within the employment relationship.

The Supreme Court Has Applied The Same Principles To The LMRA And To The RLA

The Supreme Court has not dealt directly with the issue of RLA preemption of "independent" state law remedies but it has articulated a theory of the limits of federal labor law preemption which it has applied to both the LMRA and the RLA. Both in *Atchison, Topeka and Santa Fe Ry Co. v. Buell,* 480 U.S. 557 [107 S.Ct. 1410] which addressed RLA preemption of Federal Employee Liability Act claims, and in *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 [108 S.Ct. 1877] which addressed § 301 preemption of state tort claims, this Court has said:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. (citations omitted.) Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*

Lingle, 486 U.S. at 406 [108 S.Ct. at 1884].

Melanson's claims do not arise out of statutes specifically designed to protect workers, but her claims do arise out of statutes designed to provide minimum substantive guarantees to all citizens. Cal.Civ.Code §§ 1709 & 1710 (App. 30). Several circuits have held that state tort claims for fraud, which were "independent" of the Collective Bargaining Agreement (CBA) were not preempted by § 301. *See, e.g. Berda v. CBS Inc.,* 881 F.2d 20 (3rd Cir. 1989) *cert. denied,* ___ U.S. ___ [110 S.Ct. 879] (1990), (plaintiff need only establish that CBS' agents promised he

would not be laid off for a reasonable period of time although they knew or were reckless in not knowing that CBS was planning a reduction in force that would affect him); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, ___ U.S. ___ [110 S.Ct. 1959] (1990), (examination of the terms of a severance agreement in order to determine what the *truthful* representations should have been, established relevance of the agreement but not necessarily substantial dependence for preemption purposes); *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986) *cert. denied*, 481 U.S. 1049 [107 S.Ct. 3242] (Proof that Ford fraudulently induced employment by misrepresenting that new hirees would not be "bumped" by "preferential hirees" does not depend on the existence of any contractual relationship nor do the standards for judging fraudulent misconduct derive from any contractually established expectations of the parties).

To date, there has been nothing in this Court's treatment of either § 301 or the RLA to suggest that the two statutes should not be subject to the same basic principles for determining preemptive effect on state torts. Indeed, both the standard articulated in *Lingle* for § 301 preemption and Title II, § 205 of the RLA, 45 U.S.C. § 185 (App. 26) preempt claims which require "interpretation" of the CBA. In this case, however, the Ninth Circuit did not confine the RLA to preemption of state torts which require "interpretation." As used by the Supreme Court in *Lingle*, "interpretation" means that " . . . pertinent principles of state law required construing the relevant collective bargaining agreement." *Lingle*, 486 U.S. at 404 ftnt. 7 [108 S.Ct. at 1882 ftnt. 7].[1]

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[1] The Ninth Circuit's holding in this case was not based on either "application of the CBA," or "inextricably intertwined

(Continued on following page)

B. This Case Addresses Preemption Issues Regarding Claims Which Are *Not* Based On Representations Of Specific Terms Of The CBA As Well As Claims Which *Are* Based On Representations Of Specific Terms Of The CBA

Melanson alleges that United promised it would "waive" the weight program for Pan Am flight attendants. Fraud and deceit claims based on this allegation do not stem from any representations about specific terms of the weight program and do not require that the court "interpret" the CBA. At most, the court would make a "tangential reference" to the CBA when comparing United's representations to its subsequent conduct. *See Allis-Chalmers Corp. v. Luecke*, 471 U.S. 202, at 211, [105 S.Ct. 1904, at 1911] (1985).

Melanson also alleges that during the recruitment period United misrepresented that the medical exception was available to all flight attendants taking medication. United subsequently denied Melanson's request for a medical exception on the ground that the exception was limited to medications for life threatening diseases. This

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(Continued from previous page)

with the grievance procedure." 45 U.S.C. § 185. The court did not use either of those terms in stating its reasons for preemption. Furthermore, the court found that Melanson's claims had not previously been arbitrated because the issue put before the System Board of Adjustment was "*misapplication* of a work rule" (emphasis added) whereas in this case Melanson claimed that United fraudulently induced her to transfer to United Airlines by misrepresenting that weight requirements would be waived in her case. *Melanson*, 931 F.2d at 561.

allegation raises fraud and deceit claims based on representations regarding a specific term of the weight program, which is incorporated into the CBA.

Although these two allegations of misrepresentation raise different issues with regard to RLA preemption of state torts, neither allegation requires "interpretation" as defined by the Supreme Court in *Lingle v. Norge*. As in *Lingle* the inquiry is purely factual, pertaining to the conduct and motivation of the employee and the employer. *Lingle*, 486 U.S. at 404, [108 S.Ct. at 1882].

The Ninth Circuit declined to follow *Lingle* in this case and imposed a significantly broader preemptive standard on the RLA than the Supreme Court did on § 301. For example, the Ninth Circuit found that Melanson's claim of "promise without intent to perform" was preempted by the RLA although it did not find that this claim required "interpretation" of the CBA. *Melanson*, 931 F.2d at 563.

The Ninth Circuit did find that Melanson's claims of "negligent or intentional misrepresentation" and "concealment" require "reference to and interpretation of the terms of the CBA" *Id.*, 563 but in this case "interpretation" does not mean what it meant in *Lingle*, that the " . . . pertinent principles of state law required construing the relevant collective bargaining agreement." *Lingle*, 486 U.S. at 404 ftnt. 7 [108 S.Ct. at 1882 ftnt. 7]. Cal.Civ. Code Sections 1709 and 1710 do not hold a defendant liable for misrepresentation or concealment of *the court's* interpretation of the CBA. To the extent that "resolution of the dispute," refers to the CBA, the relevant inquiry will be into United's *own* interpretation of the weight program at

the time it made the representations in question, regardless of whether the court would have "construed" it the same way. It is United's interpretation, not the court's, that will determine whether United misrepresented or concealed a material fact, or made a promise it had no intention of performing.

C. This Case Raises a Question of Statutory Interpretation With Respect to Whether Pre-Employment Fraud is Preempted by the RLA

This case also presents a third issue regarding RLA preemption. Melanson's claims of "misrepresentation," "concealment" and "promise without intent to perform" grow out of United's *pre-employment* conduct. The Railway Labor Act is expressly limited to conflicts between employer and employee. The Supreme Court has extended preemption to claims brought *after* employment, when " . . . the claim itself arises out of the employment relationship which Congress regulated." *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551-52 [79 S.Ct. 1322, 1324-5]. However, a claim based on pre-employment conduct does not arise out of the employment relationship.

The Court of Appeals for the Ninth Circuit held that Melanson's employment status was not determinative because the effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same even if the agreement was reached prior to employment. However, in this action Melanson does not seek to enforce a separate agreement.

The Ninth Circuit rejected this distinction on the ground that nearly any contract claim can be restated as a

tort claim. *Melanson*, 931 F.2d at 561 (App. 5). However, although they may be based on the same or similar facts, the two kinds of claims have a very different impact on the federal labor scheme. Conflicting agreements could affect the orderly functioning of the labor force, but holding an employer financially accountable for its tortious conduct, could not.

II.

THE NINTH CIRCUIT CONFLICTS WITH OTHER CIRCUITS REGARDING THE STANDARD FOR RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS

The similarity between the standards for preemption under the RLA and § 301 of the LMRA is highlighted by the decisions and the *dictum* of various circuits.

Prior to the decision in *Lingle*, the Seventh Circuit held that a state tort action for retaliatory termination was preempted by the RLA because the defense would be based on good cause for termination. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 [104 S.Ct. 1000] (1984). More recently, however, the Court of Appeals for the Sixth Circuit observed, in *dictum*, that the reasoning employed in *Jackson* has been repudiated by the Supreme Court's decision in *Lingle*. *Merchant v. American S.S. Co.*, 860 F.2d 204, 208 (6th Cir. 1988). In *Merchant* the court also observed, in *dictum*, that the Supreme Court's preemption analysis in *Buell*, would not have been different if the putative tort claim had arisen under state law rather than federal law. *Merchant*, 860 F.2d at 209.

The Court of Appeals for the Sixth Circuit has turned its analysis of preemption of state torts on whether breach of contract is an essential element of the state tort. In so doing it has not distinguished between § 301 and the RLA. In *Beard v. Carrolton*, 893 F.2d 117 (6th Cir. 1989) the court held that the Appellant's tort claim for wrongful interference with contract was preempted by the RLA " . . . because Kentucky makes breach of contract an essential element of the tort." (citations omitted.) *Beard, Id.*, at 122. The court distinguished its decision in *Dougherty v. Parsec Inc.*, 872 F.2d 766 (6th Cir. 1989) on the ground that Ohio law does not require breach of contract as an essential element. Although the court speculated that "The standards under the two statutes [§ 301 and the RLA] *may* not be identical," (emphasis added) no distinction was made in the court of appeals' analysis. *Beard*, 893 F.2d at 122.

The Court of Appeals for the Second Circuit has also analyzed § 301 and RLA preemption interchangeably. That court relied on the Supreme Court's decision in *Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 2693, (1985) when it said, in *dictum* that the RLA does not preempt all state law claims for retaliatory discharge. *Puchert* was a decision by the Supreme Court of Hawaii, holding that a state prohibition of discharge in retaliation for filing a worker's compensation claim was not preempted by the RLA. The United States Supreme Court dismissed the appeal for want of federal question jurisdiction. As interpreted by the Court of Appeals for the Second Circuit, "If the Hawaii law were preempted by the RLA the case would necessarily have presented the

Court with a substantial federal question." *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2d Cir. 1987).

The Court of Appeals for the Second Circuit has also held that a federal civil rights claim under 42 U.S.C. § 1983 is not preempted by the RLA because the civil rights claim has " 'a legally independent origin' " even when dismissal was upheld in RLA arbitration proceedings. *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 36 (2d Cir. 1988), quoting from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1973). Similarly, the Court of Appeals for the Tenth Circuit has held that the RLA does not preempt a claim of racial discrimination under 42 U.S.C. § 1981, in spite of the fact that the claim was based on the airline's disciplinary actions. *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988).

III.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The Ninth Circuit's ruling extends the preemptive effect of the RLA well beyond the preemptive effect of § 301, and would deprive employees of air carriers and railroads of any forum for claims based on the fraudulent conduct of their employers.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHKOL MELANSON, *Plaintiff-Appellant,* v. UNITED AIR LINES, INC., *Defendant-Appellee.*	No. 89-15566 D.C. No. CV-88-4551-CAL OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
June 6, 1990 – San Francisco, California

Filed April 24, 1991

Before: William C. Canby, Jr., John T. Noonan, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Canby

OPINION

CANBY, Circuit Judge:

Appellant Nichkol Melanson appeals the dismissal of her state law tort action against United Air Lines, Inc. ("United") for negligent and intentional misrepresentation, concealment, and promise without intent to perform. Melanson originally filed this action in state court, but United removed it to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1331 and 45 U.S.C. § 151. United then moved to dismiss the case. The district court

granted United's motion, finding that Melanson's claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* We affirm.

FACTS

In 1985, United purchased the Pacific division of Pan American Airlines ("Pan Am"). As part of the acquisition, United agreed to hire 1202 of Pan Am's flight attendants to work the newly acquired routes. In September, 1985, the Association of Flight Attendants ("AFA") opened negotiations with United over employment conditions for the transferring flight attendants. A few weeks later, United notified the flight attendants of the acquisition and invited them to transfer to United. United also informed the flight attendants that work rules and seniority integration covering their new employment at United were being negotiated with the AFA, and sent them a description of United's weight requirements for flight attendants. In December, 1985, the AFA ratified the collective-bargaining agreement ("CBA") which included the terms and conditions for the transfer of employees from Pan Am to United. The weight program is incorporated in the CBA as a term and condition of employment between United and members of the bargaining unit.

Melanson was among those Pan Am flight attendants eligible to transfer to United. She had served as a flight attendant for nearly twenty-two years. She alleges that United, while recruiting her, indicated that the weight requirements would not apply to the transferring flight attendants. At the time, Melanson was undergoing hormone treatment for infertility that caused her to gain

weight. She disclosed this fact to United and informed the company that she would not transfer if she were subject to weight requirements that would jeopardize her infertility treatment. Through its agents, United assured Melanson that it was not concerned with her weight. In reliance upon this representation, Melanson transferred to United.

Shortly after Melanson became a United employee, she was suspended without pay for fourteen months for failing to comply with United's weight policy. At the time of her suspension, Melanson was a bargaining unit employee covered by the CBA. Along with other flight attendants, Melanson brought a complaint regarding the application of United's weight program in her case before the System Board of Adjustment ("Board") as required by the CBA and the RLA, 45 U.S.C. § 184. After a hearing, the Board reinstated Melanson and awarded her back pay, but required her to submit to an individualized weight program. Melanson then stopped her infertility treatments in order to lose weight to avoid termination. This action followed.

DISCUSSION

A. Standard of Review

We review *de novo* the district court's dismissal of Melanson's claims and its statutory interpretation of the RLA. *See Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 111 S. Ct. 386 (1990); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1286 (9th Cir. 1986). In reviewing the dismissal granted under Fed. R.

Civ. P. 12(b)(6), we accept as true the allegations of Melanson's complaint. *Grote*, 905 F.2d at 1308 n.1.

B. The Effect of Melanson's Employment Status

Melanson first argues that because she was not an employee of United when first informed that she would not be subject to United's weight program, this dispute did not arise within an employment context and is not covered by the CBA or the RLA. We decline to hold that claims arising from conduct occurring prior to the commencement of a formal employment relationship are automatically screened from the preemptive force of the RLA.

Through the federal labor scheme, Congress has established a system of collective bargaining. Allowing an employee or employer, by virtue of an individual agreement, to establish an employment status different from that of other employees would undermine the efficacy of collective bargaining. Accordingly, the Supreme Court has ruled that the CBA supersedes inconsistent individual employment contracts. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944); *see also Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944) (The principles of *J.I. Case Co.* apply in the RLA context). The effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same whether the agreement is reached prior to or during a formal employment relationship. The timing of the agreement or alleged tortious act, then, is

not necessarily determinative.[1] It is the relationship of the claim to the CBA, regardless of the plaintiff's employment status, that guides the preemption analysis. The pertinent question, therefore, is whether Melanson's claims are preempted.[2]

C. Effect of Prior Arbitration

United argues that Melanson's claim was the subject of a prior arbitration procedure and cannot be raised again in this action. We disagree. The issue before the Board was:

> Whether the company ha[d] violated the Collective Bargaining Agreement by imposing discipline, up to and including termination, on several of [the] former Pan Am flight attendants, through an unreasonable and arbitrary application of its weight program . . . .

---

[1] This reasoning is not limited to contract claims. Nearly any contract claim can be restated as a tort claim. The RLA's grievance procedure would become obsolete if it could be circumscribed by artful pleading. *See Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

[2] Melanson also contends that the CBA did not apply to her at the time of the alleged misrepresentation because the AFA did not represent her in the CBA negotiations until she became a United employee and joined the AFA. This argument is without merit. The Supreme Court has stated that "[t]he labor organization chosen to be the representative of the craft or class of employees is . . . chosen to represent all of its members, regardless of their union affiliations or want of them." *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 200 (1944).

Decision of the System Board of Adjustment, Application of United Weight Program to Former Pan American Flight Attendants 1 (Jan. 16, 1988). The issue in this appeal, however, is different. Rather than alleging a misapplication of a work rule, as she did before the Board, Melanson argues here that United fraudulently induced her to transfer by misrepresenting that the weight requirements would be waived in her case. This issue was not fully litigated before the Board. Again, the real question is whether Melanson's claims are preempted by the RLA.

D. Preemption

Congress enacted the RLA to promote stability in labor-management relations by providing a framework for resolving labor disputes in the railroad industry. *See Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987). Title II of the RLA extends the RLA's coverage to the airline industry. 45 U.S.C. § 181. Congress specifically intended the RLA to keep airline labor disputes out of the courts. *See Lewy*, 799 F.2d at 1289. Consequently, the RLA provides for mandatory administrative grievance procedures as the exclusive remedy in claims arising from "minor disputes" under collective-bargaining agreements. *See Andrews v. Louisville & N. R. Co.*, 406 U.S. 320, 322-23 (1972). "Minor disputes" are the "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978). We have also defined "minor disputes" as those which are "arguably" governed by the CBA or have a "not

obviously insubstantial" relationship to the labor contract, *Magnuson*, 576 F.2d at 1369-70, "are 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA,' " *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989) (quoting *Magnuson*, 576 F.2d at 1369), or which involve the interpretation of a current collective-bargaining agreement. *See International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

In resisting preemption, Melanson asks us to apply, by analogy, cases discussing preemption under § 301 of the Labor-Management Relations Act, 42 U.S.C. § 185. She cites *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) in support of her argument that state law remedies "independent" of the CBA are not preempted by § 301. *Lingle* held that claims are "independent" when "the state-law claim can be resolved without interpreting" the collective bargaining agreement. *Id.* at 410. We have made clear, however, that the narrower test for § 301 preemption under *Lingle* is not necessarily determinative of preemption under the RLA because "preemption under the RLA is broader than under § 301." *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990). Thus, some claims that might escape preemption under *Lingle* and § 301 may nevertheless by preempted under the RLA.[3]

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[3] An example of the distinction may be drawn from two cases that predate *Lingle*. Melanson relies in part on *Tellez v.*

(Continued on following page)

We therefore review Melanson's claims to determine whether they are "minor disputes" under the RLA; that is, whether they " 'concern the interpretation or application of' " the CBA. *Edelman*, 892 F.2d at 843 (quoting *Int'l Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985)). A claim is also considered a "minor dispute" if it is " 'inextricably intertwined with the grievance machinery of' " the CBA or RLA. *Id.*, (quoting *Magnuson*, 576 F.2d at 1360).

Melanson asserts three theories under California law which comprise her cause of action for fraud: 1) negligent or intentional misrepresentation; 2) concealment; and 3) promise without intent to perform. To prevail on her misrepresentation theory, Melanson must show, *inter alia*, that United made a false representation of material fact. *See Univeral [sic] By-Products, Inc. v. City of Modesto*, 43

(Continued from previous page)

Pacific Gas & Elec. Co., 817 F.2d 536, 538-39 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987). In *Tellez*, we found that section 301 did not preempt claims of defamation and intentional infliction of emotional distress because the claims arose from the employer's distribution of a letter alleging that the plaintiff had bought cocaine on the job. We held that the claims could be resolved without reference to the CBA.

Tellez is to be contrasted with *Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983), in which we held that the RLA preempted a state law claim for intentional infliction of emotional distress arising from harassment on the job, because the claim could have been made the subject of RLA grievance arbitration.

As we point out later in the text, however, Melanson's claims do not even meet the standard of *Tellez;* they cannot be resolved without reference to the CBA.

Cal.App.3d 145, 151, 117 Cal. Rptr. 525, 528 (1974); Cal. Civ. Code §§ 1709, 1710. To demonstrate the falsity of United's alleged representations regarding its weight program, Melanson must show that the relevant provisions of the CBA differ significantly from those representations. This showing requires reference to and interpretation of the terms of the CBA. Resolution of this misrepresentation claim, then, depends on an analysis of the CBA, and the alleged tortious activity is at least "arguably governed" by the CBA. Therefore, the district court properly dismissed Melanson's misrepresentation claim as preempted.

The elements of Melanson's second fraud claim, concealment, are: 1) suppression of material fact; 2) by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; 3) with intent to deceive a person unaware of the concealed fact and who would not have acted had he known of the fact. Cal. Civ. Code §§ 1709, 1710. Melanson contends that United improperly concealed its intention to waive its weight requirements for hiring purposes only and to reinstate the program once the new flight attendants were hired. She also alleges that United fraudulently concealed the fact that medical exceptions to the weight program were limited to life-threatening situations and did not extend to weight gain caused by medication or medical treatment.

To determine whether United concealed a material fact from Melanson requires a comparison of United's representations to Melanson with the terms of the weight program in the CBA. Thus, as the misrepresentation

claim, this claim requires reference to and interpretation of the CBA. Melanson's concealment claim is preempted.

Melanson's final fraud theory under California law is promise without intent to perform. To establish this claim, Melanson must prove that United made a promise about a material matter, with no intention of honoring that promise, that induced her to take action she otherwise would not have taken. *See* Cal. Civ. Code §§ 1709, 1710, *see also Cicone v. URS Corp.*, 183 Cal.App.3d 194, 203, 227 Cal. Rptr. 887, 892 (1986); *Miller v. National American Life Ins. Co. of California*, 54 Cal.App.3d 331, 338, 126 Cal. Rptr. 731, 734 (1976). "A promise to do something necessarily implies the intention to perform, and where such intention is absent, there is an implied misrepresentation of fact, which is actionable fraud." 5 B. Witken, Summary of California Law § 685 (9th ed. 1988).

This claim presents a somewhat closer question, but we conclude that Melanson cannot prove the elements of this claim without reference to the CBA or to conduct governed by the CBA and its grievance machinery. It is true that the representations United made to Melanson and her reliance on those representations can be established without reference to the CBA. But as a practical matter, proof of United's intent not to perform and its nonperformance lead inevitably to the CBA. The weight standards that United enforced are incorporated into the CBA. That enforcement constituted the repudiation of United's alleged promise to Melanson, and it is that repudiation that permits the trier of fact to infer that United never intended to perform its promise to Melanson. "The subsequent repudiation relates back to the original promise." *Cicone v. URS Corp.*, 183 Cal.App.3d 194, 203, 227

Cal.Rptr. 887, 892 (1986). If the CBA in fact guaranteed Melanson an exemption from the weight requirements, her claim would clearly be affected, if not defeated. Her claim can scarcely be litigated without reference to the CBA.

All three of Melanson's state law claims would intrude, then, upon the collective bargaining system established by Congress under the RLA. Even under the narrower preemption test of section 301, we held similar claims preempted in *Bale v. General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986). There, two workers claimed fraud and misrepresentation by the employer in representing that they, as temporary employees, would obtain permanent status after six months, when the CBA provided otherwise. We said:

> In order to prove their fraud and negligent misrepresentation claims, [plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

Id. at 780 (quoting *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985)). The same considerations compel preemption here, even more strongly. The entire "minor dispute" resolution system of the RLA was intended to provide prompt resolution, without resort to the courts, of disputes arising out of the employment relation. *Edelman*, 892 F.2d at 843, 45 U.S.C. § 151a. Melanson's claims are encompassed by that purpose.

CONCLUSION

The district court properly held that Melanson's state law claims are preempted by the RLA. We therefore affirm the judgment.

AFFIRMED.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHKOL MELANSON, Plaintiff, v. UNITED AIR LINES, INC. and DOES I to XX, inclusive, Defendants.	Case No. C 88 4551 CAL JUDGMENT BY THE COURT (Filed April 12, 1989)

This Court, having on March 24, 1989 granted Defendant United Air Lines, Inc.'s Motion for dismissal as to Plaintiff's Complaint and having ordered entry of judgment as requested in said motion.

IT IS ORDERED, ADJUDGED AND DECREED that this action be and hereby is dismissed with prejudice in its entirety and that judgment is hereby entered in favor of Defendant and against Plaintiff.

DATED: April 12, 1989

/s/ Charles A. Legge
The Honorable Charles A. Legge
Northern District Court Judge

ENTERED IN CIVIL
DOCKET 4/14, 1989

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHKOL MELANSON, Plaintiff, v. UNITED AIR LINES, INC.; and DOES I to XX, inclusive, Defendants.	Case No. C 88 4551 CAL ORDER ON MOTION TO DISMISS (Filed April 12, 1989)

Having come on for hearing before this Court on March 24, 1989 at 9:30 a.m., or as soon thereafter as the matter was heard, and having considered the record in this matter, and the arguments and evidence presented by the parties to this action, by and through their attorneys of record, and having stated the reasons for the instant ruling in open Court,

IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss be and hereby is GRANTED in its entirety.

(2) That this action be and hereby is dismissed with prejudice, and

(3) That judgment be entered in favor of Defendant and against Plaintiff.

DATED: April 12, 1989

/s/ Charles A. Legge
The Honorable Charles A. Legge
Northern District Court Judge

45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter –

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV to Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any other receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or

defined by the provisions of this chapter or by the orders of the Commission.

The term "employees" shall not include, any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

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45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization: (3) to provide for the complete independence of carriers and of employees

in the matter of self-organization to carry out the purposes of this chapter: (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.

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45 U.S.C. § 155. Functions of Mediation Board

First, Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring

them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second, Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contract with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to

arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in

controversy to be submitted to it. No evidence other than that contained in the record file with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees have been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between

carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

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45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

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45 U.S.C. § 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of

subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

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45 U.S.C. § 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by

system, group or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

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45 U.S.C. § 185. National Air Transport Adjustment Board

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their

employees, national in scope, as have been or may be recognized in accordance with the provisions of this chapter, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment

Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this subchapter. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

29 U.S.C. 185. Suits by and against labor organizations Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect

commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for

his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

California Civil Code section 1709,

> One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

California Civil Code section 1710,

> A deceit, within the meaning of the last section, is either;
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.
>
> 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
>
> 4. A promise, made without any intention of performing it.
